Superior Emerald Park Landfill, LLC *and* International Union of Operating Engineers, Local 139, AFL–CIO. Cases 30–CA–16148 and 30–RC–6468

September 30, 2003

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On May 13, 2003, Administrative Law Judge Paul Buxbaum issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions. The Respondent filed an answering brief to the cross-exceptions and a reply brief to the General Counsel's answering brief. The General Counsel filed a reply brief to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order and direct a second election.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have been discharged for cause since the payroll period, striking employees who have quit or been discharged for cause since the strike began, and who have not been rehired or reinstated before the date of the election directed, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the International Union of Operating Engineers, Local 139, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by promulgating, maintaining, and enforcing an unlawful no-distribution policy, we find it unnecessary to pass on the judge's finding that the Respondent promulgated and enforced this policy in reaction to union organizing and with antiunion animus.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by unlawfully soliciting grievances and impliedly promising to remedy them, Chairman Battista finds it unnecessary to rely on (a) the statement by the Respondent's general manager, Robert Borkenhagen, asking employees to give him a chance to prove himself; and (b) the judge's finding that the Respondent changed from a past practice of passive grievance solicitation to an active practice of grievance solicitation.

Chairman Battista also finds it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) when Borkenhagen told employees that if the Union won, bargaining would start from "zero," or "scratch," because this finding would be cumulative of other violations found, i.e., the threat to freeze wages, and would not affect the remedy.

grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. September 30, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Brent E. Childerhose and *Joyce Ann Seiser, Esqs.*, for the General Counsel.

Bruce F. Mills and *Kelly J. Klick, Esqs.*, of Milwaukee, Wisconsin, for the Respondent.

William J. Burg, of Pewaukee, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on January 23 and 24, 2003. In Case 30–CA–16148 the original charge was filed September 4, 2002, and amended charges were filed September 12 and October 31. The complaint was issued October 31, 2002, and an amended complaint issued on January 15, 2003.

In Case 30–RC–6468, on September 4, 2002, the Union filed objections to an election held on August 28, 2002. Additional objections were filed September 12 and October 31.[1] On November 7, 2002, the Regional Director issued an order consolidating cases and notice of hearing on objections to conduct affecting the results of the election.[2] By this order, the two cases were consolidated for hearing.

The unfair labor practice charges and objections to the election arise from the same alleged misconduct. The Company is alleged to have maintained and enforced an overly broad no-solicitation policy, to have improperly interrogated its employees regarding union activities, improperly promised its employees improved working conditions, and impliedly promised improved benefits. It is further alleged that the Company threatened its employees by asserting that if they decided to be represented by the Union, the Company would bargain from scratch and would freeze wages and benefits until a collective-bargaining agreement was reached. The Company is also alleged to have threatened its employees with discharge in the event that they participated in a strike. Finally, it is alleged that the Company threatened an employee with a wage adjustment due to union activities, promised an employee a wage increase, and granted wage increases with the purpose of interfering with employees in their exercise of their rights under the Act. These actions are alleged to have violated Section 8(a)(1) of the Act and to have compromised the results of the election held on August 28, 2002. The Company filed answers to the complaint and amended complaint, denying all material allegations.[3]

On the entire record,[4] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a limited liability corporation, processes and stores municipal trash and other forms of waste at its facility in Muskego, Wisconsin, where it annually purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin. The Company admits,[5] and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Organizing Campaign and the Company's Response

The facility involved in this case, Superior Emerald Park Landfill, LLC has eight employees who process municipal trash, asbestos, and other waste products. It is organized as a limited liability corporation under the laws of Wisconsin.[6] This corporation is owned by Onyx Waste Services, which, in turn, is part of Onyx North America. A French corporation, Vivendi Environment, owns Onyx North America.

In 2001 the Company hired Jeff Lauer and Eric Schauer, two heavy equipment operators who figure prominently in this matter. Lauer had been a member of Local 139, International Union of Operating Engineers, since 1988. Approximately 3 months after the Company hired him, he telephoned Matthew DeHahn, the business representative and organizer for the Union. Lauer proposed that the Union begin an organizing cam-

[1] Some of the Union's objections were subsequently withdrawn. (GC Exh. 1(j) fn. 2.)

[2] In his report and order regarding the Union's election objections, the Regional Director added further objections arising from his investigation. (GC Exh. 1(j) pp. 4–5.)

[3] The Company also filed a pretrial motion to dismiss the objections to the election on the basis that they lacked the specificity required by Sec. 102.69(a) of the Board's Rules and Regulations. (GC Exh. 1(l).) The General Counsel filed an opposition. (GC Exh. 1(o).) I denied the motion, finding that the allegations, taken as a whole, were sufficiently specific and that the Regional Director possessing broad discretion in this area did not abuse that discretion by deciding to accept the filing of the objections. (Tr. 10–11.)

[4] The transcript contains some minor errors. At Tr. 22, I asked counsel for the Respondent about the contents of the answer to the amended complaint. At L. 5, he is quoted as saying, "We denied denying." He actually said, "We denied everything." At Tr. 55, L. 13, the witness is asked to confirm that he "didn't ta[p]e that meeting then." In fact, he was asked to confirm that he hadn't taped that meeting. At Tr. 71, LL 18–19, the witness testified that he was asked if "we had a meeting that might." The actual reference was for a meeting that night.

[5] See Respondent's answer, pars. 2 and 3. (GC Exh. 1(i).)

[6] The corporate name is Onyx Superior EPL [Emerald Park Landfill], LLC.

paign among the Company's heavy equipment operators. This suggestion was adopted by the Union.

Lauer and Schauer were very active in the organizing effort. Lauer testified that he solicited involvement from other employees and attended meetings. Schauer agreed with counsel for the Company's characterization of him as having "openly supported" the Union. (Tr. 56.) He wore hats and T-shirts with union insignia and carried a lunchbox with a union sticker. Schauer also performed clandestine taping of three meetings with management officials relating to the organizing campaign.

On June 13, 2002, Lauer and Schauer signed a letter authorizing the Union to act as their collective-bargaining representative. Two other equipment operators also signed this authorization letter. The letter asserted that the four signatories constituted a bargaining unit of four full-time equipment operators. It requested that the Company make immediate arrangements to negotiate a collective-bargaining agreement with the Union. (GC Exh. 2.)

This demand for recognition of the Union was presented to Gene Kramer, the Company's general manager, on June 18.[7] Both Schauer and Lauer delivered the recognition letter to Kramer. Schauer also used a concealed tape recorder to record their conversation.[8] After receiving the letter, Kramer abruptly terminated the meeting. Schauer testified that he "just shooed us out of his office," and Lauer described Kramer as "kind of boot[ing] us out of the office." (Tr. 30 and 70.)

While the evidence does not disclose the Company's precise response to the request for recognition, it is evident that it was not favorable. As a result, on July 15 the Union filed a petition for an election. On July 29 the Regional Director approved a Stipulated Election Agreement that determined that the applicable unit would consist of eight employees, those being the "full time and part-time equipment operators, mechanics, and ground maintenance employees" of the landfill. (GC Exh. 1(j) p.1.) The election was held on August 28, 2002. All of the eligible employees voted. There were no challenged ballots. The election results were evenly divided, four employees having voted for the Union and four against it. On September 4 the Union filed its initial objections to conduct that it asserted had affected the results of the election. (GC Exh. 1(a).)

In order to assess the validity of the Union's contentions, it is necessary to examine the events that transpired during the representation campaign. Very shortly after Lauer and Schauer presented their request for recognition to General Manager Kramer, he was replaced. His replacement as general manager was Robert Borkenhagen. Borkenhagen had worked for the parent company for 5 years and was serving as general manager at another facility. He testified that during the "second or third week in June" he was contacted concerning the position of general manager at Superior Emerald Park. (Tr. 151.) One week later, he attended a meeting to discuss this position. At the meeting, he was offered the job and was told that he would be advised of his start date.

Borkenhagen assumed his new position on July 19; a day after the Union filed its petition for an election. Borkenhagen testified that he was unaware of this filing when he commenced his duties as general manager. Shortly after taking over, he met with his predecessor, Kramer, and with the facility manager, Thomas Marach. They reviewed the records regarding the Company's equipment, and Borkenhagen concluded that the equipment was "in pretty rough shape." (Tr. 155.) He testified that he understood that having to work with such equipment was "very frustrating" for the employees. (Tr. 155.) He was aware of underutilized equipment at some of the parent company's other facilities and decided to "look at the possibility of acquiring other equipment" from those facilities. (Tr. 156.) He testified that he made this decision in order to create a more "effective, efficient, environmentally sound operation." (Tr. 157.)

Four days after assuming his new position, Borkenhagen learned that the Union had filed a petition for a representation election. According to Lauer, on that same day, Borkenhagen came into the employees' lunchroom and introduced himself to Lauer and Schauer.[9] Schauer reported that Borkenhagen told them that he was going to try to obtain more equipment and staff and was "going to make necessary changes to make it a better place to work." (Tr. 32.) Lauer testified that Borkenhagen described his own prior membership in the Union and offered to try to work out any differences. Lauer went on to relate that "somewhere toward the end [of their discussion] he [Borkenhagen] asked us if we had a meeting that night." (Tr. 71.) Lauer did not respond to this question, but Schauer told Borkenhagen that "no, we didn't have one. We had one Monday . . ." (Tr. 71).[10] Borkenhagen reported that he knew that Lauer and Schauer were primary union organizers. When asked if he had ever questioned them about "where and when union meetings were held," he denied making such inquiries. (Tr. 157.) He opined that such information was "irrelevant to me." (Tr. 171.)

Both Lauer and Schauer testified that they had a further discussion with Borkenhagen on a second occasion. The conversion took place in the lunchroom on July 29.[11] Borkenhagen told the two union activists that he was trying to obtain more equipment. Schauer testified that Borkenhagen then asked

[7] Lauer testified that this happened on June 18. Schauer simply indicated that it was in mid-June. As will become apparent, Schauer generally showed considerable difficulty in recounting dates and chronology. By contrast, Lauer was quite precise about these matters.

[8] This tape was not introduced into evidence.

[9] Lauer testified that this conversation took place on July 23. Schauer reported that it occurred around July 25. Given my assessment of Schauer's poor ability to recount such information and Lauer's contrasting precision in these matters, I credit Lauer.

[10] Lauer testified that Schauer's reference to a meeting on Monday was not a union meeting, but rather an event involving the Regional Office. While never made explicit, I conclude that the reference may have been to the filing of the election petition on Monday, July 15. Lauer also testified that Schauer's answer was incorrect, since a union meeting was actually scheduled for that evening.

[11] I credit Lauer's testimony as to the date. Schauer testified that the conversation occurred approximately a week before a meeting at the Regional Office on July 29. This would not make sense, as it would place the meeting before the date Schauer recollected for the occurrence of the first meeting with Borkenhagen. This illustrates Schauer's unreliability as to dates and chronology.

"where and when" a union meeting would be held. (Tr. 33.) Schauer went on to relate that he responded in a manner similar to his response to the earlier questioning about union meetings. In other words, he intentionally confused union meetings with meetings at the Regional Office, telling Borkenhagen that the meeting was on Monday. Lauer testified that Borkenhagen told the men that he wanted to "see if we could work out the differences and get this thing settled." (Tr. 72.) As previously indicated Borkenhagen denied making any inquiry as to the dates and places of union meetings.

Schauer testified that Borkenhagen engaged the two activists in a third conversation of a similar nature. He reported that this occurred in early August. According to Schauer, Borkenhagen told the men that he wished he had gotten the job as general manager earlier so that they could have resolved some of the issues and problems.

On August 7 the Company commenced a series of meetings with its employees designed to present its position regarding the organizing campaign. Martin Demeter, the Company's vice president for human resources, testified that the two meetings on August 7 were "kickoff meetings to begin our discussions with the employees about the union organizing campaign." (Tr. 141.) The meetings were held in the lunchroom during each group of employees' lunch period. The first meeting began at 11 a.m., and was attended by four employees, Lauer, Schauer, Gene Zabler, and Tina Zabler. Present on behalf of management were Demeter, Borkenhagen, and Marach.

Borkenhagen began the meeting by introducing himself as the new general manager. He also introduced Demeter. He explained the purpose of the meeting. There were some preliminary questions regarding the facility's current equipment. After this, the discussion turned to the issue of union representation. At approximately this point in the meeting, Schauer began recording the conversation by use of a concealed tape recorder.[12] As this recording and a transcript prepared from it are key evidence in this trial, it is necessary to examine the circumstances involved in their preparation. All witnesses who were present at the meeting and examined the transcript of the recording are in essential agreement about two things. First, they agree that the recording and its transcription do not capture everything that was said at the meeting. The tape does not begin at the commencement of the meeting. It does not contain Borkenhagen's introductory remarks and the discussion about the facility's present equipment.[13] In addition, due to the nature of clandestine taping, portions of the recorded discussion were unintelligible. These missing portions are noted on the transcription.

Although everyone agrees that the tape and transcript are incomplete, all of the witnesses who were asked about the accuracy of the portions of the tape and transcript that are in existence confirmed that they are accurate. In particular, Facility Manager Marach testified that he listened to the tape and read the transcript. From this, he concluded that "[t]he parts that I could make out were accurately transcribed." (Tr. 139.) Schauer testified that he listened to the tape and verified its accuracy before turning it over to a union official. After the union official obtained a transcription, Schauer studied the tape and transcript and made corrections to the transcription. These corrections were incorporated into the completed transcript.

Based on this essentially uncontroverted testimony, I concluded that the tape and transcript were admissible under the framework established in Rules 1001–1003 of the Federal Rules of Evidence. I reached this conclusion because the accuracy of the transcribed portions of the meeting is not in dispute. I have also considered the issue of the incompleteness of the tape and transcription. At trial, counsel for the Company raised the possibility that other things were said that could be viewed as affirmative defenses to some of the General Counsel's allegations. Nevertheless, no evidence was presented that the transcribed portions of the meeting left out any conversations that would have constituted any such affirmative defense. In fact, there is no evidence that any missing portion of the meeting involved statements that would materially affect the result in this case. There is nothing to suggest that the lack of completeness undermined the fundamental accuracy and reliability of the tape and transcript or that the tape and transcript failed to correctly convey the tenor and import of the Company's presentation during the meeting.

As reflected in the tape and transcription, Borkenhagen repeatedly addressed two themes that are contended to be improper as constituting both unfair labor practices and conduct affecting the fairness of the representation election. Borkenhagen offered to "do whatever I possibly can . . . to address any concerns or issues . . . that ha[ve] happened in the past . . . [w]hether it be equipment, personnel, needs, changes in the company, changes in the economy . . . ." (GC Exh. 3 p. 1.) Shortly thereafter, he observed that "now is the time to bring some of those questions out." (GC Exh. 3 p. 1.)

The second theme that Borkenhagen articulated concerned his view of how negotiations would proceed if the employees voted in favor of union representation. He informed the meeting participants that he had experience with such matters and that:

> whatever we currently have now is basically thrown out the window, we start all over with the negotiations, and everything is negotiated, everything's negotiated. Its just not a format or foundation you start from, its zero.

(GC Exh. 3 p. 2.) Not long after, Borkenhagen returned to this point, asserting that in the event the Union becomes involved,

> basically what that really does is freezes everything currently the way it is. So if it goes on for three months, it goes on for six months, it goes on for a year, two years, whatever, ah, [unintelligible portion] from a legal perspective I, I don't know what the lengths of times are, but I know that it can go at least

[12] The original tape is GC Exh. 9(a). A transcription of this tape is GC Exh. 3. Counsel for the General Counsel also offered an annotated version of the transcription. (GC Exh. 5.) The annotations are designed to show those portions that are asserted to constitute evidence of the alleged unfair labor practices. I admitted this document only for the limited purpose of illuminating the General Counsel's legal arguments.

[13] Counsel for the Company also asked Borkenhagen if the recording began after some discussion of the union campaign. He responded that this may have been the case. I place little weight on this testimony since Borkenhagen was never asked to relate the content of any such preliminary discussion of the campaign.

> to the minimum of as much as a year and possibly more depending on what the circumstances and issues may become, but everything is basically frozen from the point on. You start from ground zero. Benefits, wages, ah, everything and then you negotiate and whatever you negotiate, you negotiate and whatever you agree on or company and Union agree on that's where we start. At least there's a foundation. It doesn't mean it's going to get signed and it doesn't mean the company is going to agree to anything that the Union comes up with. They don't have to agree to anything, they're not in a position to. Ah, but that's when they do come to a mutual agreement is when the negotiations, at least have a star[t]ing plateau. Any other questions?

(GC Exh. 3 p. 3.) In response to a question from an employee, Borkenhagen reiterated this view of the negotiating process. He opined that "really you start from scratch." (GC Exh. 3 p. 9.) Putting it yet another way, he observed that the parties "throw everything out and start over." (GC Exh. 3 p. 9.)

Finally, near the conclusion of the meeting, Borkenhagen asserted that it is possible that the Company and the Union might never reach an agreement. Ominously, he went on to state, "[b]ut I do know if that's the case, the company is going to do whatever it has to to survive." (GC Exh. 3 p. 9.)

Immediately after the conclusion of this meeting, the Company convened a second lunchroom meeting with another group of affected employees. The same management representatives attended. Attending employees included David Brickler, Steve Dziekan, and Jose Rivera. The contents of this meeting were not recorded or transcribed. Brickler testified that Borkenhagen did not tell the employees that if they voted for union representation, bargaining "would begin from scratch." He also indicated that Borkenhagen never told them that wages would be "frozen." (Tr. 180.) On the other hand, Dziekan testified that Borkenhagen told them that:

> Nothing changes as we are right now as a company. No pay changes. No benefit. Everything stays the same until negotiations are finalized[.] [Tr. 186.]

One week after these kickoff meetings, the Company held a second set of meetings designed to address the organizing campaign. The meetings were held in the same location and at the same times as the first set. The same management officials and employees attended. Unlike the first set of meetings, no tape recording was made.

Demeter described the purpose of the second meetings as "primarily to go over our benefit package." (Tr. 142.) Borkenhagen testified that he began each of these meetings by again introducing himself and Demeter. Demeter then made a presentation about such company benefits as health insurance, the 401(k) plan, and the employee assistance programs. At the conclusion of this overview, Demeter brought up the subject of union negotiations. He testified that he raised this issue "because I suggested to the attendees that everything I just presented would be negotiated" if the Union were to become the representative of the employees. (Tr. 142.) Borkenhagen described Demeter's comments about this issue, testifying that Demeter told the employees:

> that everything had to be negotiated. Could make more, could make less. Don't know. Everything had to be negotiated.

(Tr. 158–159.) Significantly, Borkenhagen also testified that beyond the explanation of the Company's benefit package, the meeting had another purpose. This purpose was to suggest to the employees that:

> if there [are] any issues or problems and they don't want to confront us there [are] other methods and means within the organization to pursue. [Tr. 158.]

Around the time of the second set of meetings, approximately 2 weeks prior to the election, the Company installed a locked bulletin board in the lunchroom. The Company posted two documents regarding the organizing campaign on this bulletin board.[14] One of these documents is entitled, "*QUESTIONS AND ANSWERS*." (Emphasis in the original.) (GC Exh. 6.) This posed a set of questions and responses regarding the consequences of a union victory in the election. The first question asked what would happen to "current wages if the Union is voted in." The response was:

> Your current wages will remain the same with no changes during negotiation of a contract. No changes can be implemented by Superior Emerald Park Landfill in any benefits! It is possible that negotiations may take a long time—even up to one year. Your wages and benefits would be frozen at current wage policy levels for the period of negotiations until a final agreement is reached.

(GC Exh. 6 p. 1.) Another of the questions posed in the document concerned the effect of an impasse between the Union and the Company. The answer to this question indicated that the Union would have two choices, either to accept the Company's final offer or to "call you out on economic strike." Among the consequences of such a strike, the Company asserted that:

> You can be permanently replaced on your job; so when the strike ends, you may not have a job to return to. By law, Superior Emerald Park Landfill is not required to rehire you if you have been permanently replaced.

(GC Exh. 6 p. 2.) The final question addressed in the document asked what voting for union representation would do for the employees. The response observed that the Company hoped that it had shown that a union was not the answer to existing problems. It went on to note:

> Of course, things here at Superior Emerald Park Landfill are not perfect. But we have tried—and will continue to try—to make changes, improvements and corrections whenever we can. We believe we can do that best by working together with you directly without a third party that may not share the same concerns as we do. [GC Exh. 6 p. 2.]

The second company document posted on the lunchroom bulletin board was entitled, "*WHAT ARE 'UNION NEGOTIATIONS' ALL ABOUT*?" (Emphasis in the original.) (R. Exh. 2.) This ad-

[14] The record does not disclose the order in which the documents were posted. It is apparent from their contents that both were posted during the period leading up to the August 28 election.

dressed a number of issues. The first of these concerned the timing of a collective-bargaining agreement. It asserted that the Union would try to persuade employees that it would obtain a collective-bargaining agreement that will "get you more" and that this would happen "'right away.'" The Company responded that:

> *THIS IS NOT TRUE!!!* Here are some hard *FACTS* concerning what Union negotiations are all about.
>
> Negotiations do not begin "right away." There might be all sorts of court fights. It is not at all unusual for it to take many months, even years, from election day to the day a contract is signed.

(Emphasis in the original.) (R. Exh. 2.) The document goes on to note that the parties could reach impasse and that the Union could call a strike. In that event,

> Superior Emerald Park Landfill may exercise its right to permanently replace economic strikers. This means that the strikers will have lost their jobs, at least until their replacements quit! [R. Exh. 2.]

As would be expected, the representation election campaign involved dissemination of literature by both sides. Lauer testified that early on the morning of August 23 he placed union literature on a lunchroom table. This consisted of brochures describing the Union's programs and benefits. (GC Exh. 8.) Lauer reported that he placed a quantity of these designed to provide one for each prospective voter. When Lauer returned to the lunchroom to eat his lunch he observed that the literature was gone.

Facility Manager Marach testified that he removed the union materials from the lunchroom table. He reported that he offered to return the materials to Schauer. Schauer confirmed a conversation with Marach and indicated that Marach told him that, "we cannot have any union literature on company property." (Tr. 53.) Marach testified that he informed Schauer about a much more limited restriction. He indicated that such materials were not permitted "in the lunchroom on the lunchroom tables." (Tr. 122.)

Marach also spoke to Lauer about the literature. Lauer testified that Marach told him that the materials were not "allowed on company property and that he had the material and if I wanted it back he'd give it back." (Tr. 74.)

At trial, Marach was asked if he told Lauer and Schauer that union literature "was excluded from company property." He responded that he had said this. He was asked why he made this response and he noted that union literature "was not allowed on company property in accordance with our employee handbook." (Tr. 125.) Marach reported that the reason for the restriction on placement of materials on the lunchroom tables was that these tables were used by the Company as a means to distribute written information to employees about "benefits, programs offered by the company, notices of safety meetings . . . . [t]hings of that nature." (Tr. 123.) Nevertheless, Marach conceded that he was aware of two other instances of employee use of the tables for distribution of materials. One such use concerned placement of a signup sheet for Girl Scout cookies. The second use involved a picture of a stock car that is owned by two employees and is sponsored by the Lions Club. The Company had not taken any action to remove these items from the lunchroom tables.

Other witnesses confirmed the uses of the lunchroom tables for distribution of information. Schauer agreed that "at times" the Company used the tables "as a kind of mailbox for employees." (Tr. 60–61.) He also noted that he had observed use of the tables for Girl Scout cookie materials and information regarding Lions Club functions. By the same token, Dziekan testified that the Company uses the tables to distribute items. The only other things he has observed on the tables are the union literature and the Girl Scout cookie signup sheet. When asked if the Company had a policy about placing noncompany materials on the tables, he indicated that there was "[n]othing really carved in stone that you couldn't do that." (Tr. 189.) Gene Zabler also testified that a Girl Scout cookie signup sheet had been placed on a lunchroom table.

Three days after the controversy regarding union literature on lunchroom tables, the Company convened its third and final set of meetings in response to the organizing campaign. These meetings were held at the same time and place as the earlier meetings. The first of the two meetings was attended by Borkenhagen, Marach, Lauer, Schauer, and Gene and Tina Zabler. Once again, Schauer brought a concealed tape machine and recorded the meeting.[15] As with the earlier tape and transcript, nobody has contended that the transcription of portions of the meeting that could be recovered from the tape is inaccurate in any way. The evidence also shows that, like the transcription of the earlier meeting, the transcript is not complete. In fact, the transcript commences by noting that the "[t]ape started in mid-stream." (GC Exh. 4 p. 1.) It also contains notations showing that portions of the tape were illegible, including portions where too many people were speaking at the same time.

As with the earlier tape and transcript, I concluded that the General Counsel's motion to admit this evidence was well supported. No evidence was presented to suggest that any transcribed statements were incorrect. While the tape did not capture the beginning of the meeting, it is apparent from the initial portion of the transcription that at least part of the missing discussion concerned the type of wheels on a piece of company equipment and the best way to use that vehicle. There was no testimony indicating that matters involving the organizing campaign were discussed prior to the commencement of the recording. Likewise, there was no evidence presented suggesting that the missing portions of the transcript contained any statements that would materially affect the assessment of the propriety of management's conduct. I conclude that the tape and transcription convey the substance of the discussion in an accurate and reliable manner, preserving the tone and context of the Company's message. As a result, I have admitted the tape and transcript into evidence.

[15] The original tape is GC 10(a). The transcription is GC Exh. 4. As with the transcription of the tape of the earlier meeting, counsel for the General Counsel also submitted an annotated version of the transcript. (GC Exh. 5.) I admitted this for the limited purpose of illustrating his legal arguments.

It is contended that Borkenhagen made a number of statements at the meeting that constituted unfair labor practices and conduct affecting the fairness of the representation election. These statements involved several topics. Borkenhagen repeatedly took note of his own efforts to obtain more equipment from other branches of the Company. He listed those items already acquired and promised to seek more, even though he indicated that he was angering other company officials in the process. He also promised to "try and put some justification to get some additional help," observing at another point that he believed that "we're a little short handed here." (GC Exh. 4 pp. 3 and 11.) He indicated that getting more staff would not be an easy matter, but "I'm gonna try, gonna try, gonna try." (GC Exh. 4 p. 3.)

In his talk, Borkenhagen also addressed the recent controversy about the placement of union literature on the lunchroom tables. He noted that Marach had explained to Schauer and Lauer that putting this material on the tables was "not allowed" due to "company policy." (GC Exh. 4 p. 4.) Indeed, he drew a direct connection between the decision not to permit such placement of union literature and the ongoing organizing effort. He told the employees that, "[w]e're campaigning[,] we feel we have to do this [prohibit the materials on lunchroom tables] to be competitive." (GC Exh. 4 p. 4.) Lauer asked Borkenhagen if there was a written memo concerning this issue. Borkenhagen simply reiterated that it was "company policy." (GC Exh. 4 p. 4.)

One of Borkenhagen's most persistent themes throughout the meeting was expressed by his repeated pleas to "give me a chance," so that he would have "an opportunity to prove myself." (GC Exh. 4 pp. 4, 5, and 12.) He coupled this request for time to prove himself as the new general manager with the suggestion that if he failed to satisfy the employees, "you can bring election up at a later date." (GC Exh. 4 p. 5.) He summarized this point near the end of his talk as follows:

> Thanks guys, I do appreciate it though. I hope you give me an opportunity to prove myself. Six months from now or a year from now you can all go through the same process.

(GC Exh. 4 p. 12.) He also promised that, "regardless of what happens," he would "constantly come to you guys for questions." (GC Exh. 4 p. 15.)

As had become customary, the Company followed this meeting with another meeting involving the remaining affected employees. The second meeting was not recorded. The Company introduced a document that sheds light on Borkenhagen's presentation at this meeting. This document consisted of a copy of Borkenhagen's typed notes that he used to guide his remarks during both meetings on August 26.[16] (R. Exh. 3.) Among his talking points was a discussion of the collective-bargaining process. He characterized this by observing that "[i]t's all negotiable." (R. Exh. 3 p. 1.) In the event of impasse, the Union would possess the option of striking. If this occurred, "you can be permanently replaced during an economic strike—that's the law." (R. Exh. 3 p. 1.)

Borkenhagen's notes also contained references to two themes that he addressed in the first meeting as revealed in the transcript. He observed that he had been newly installed as general manager and asked that the employees, "[g]ive me a chance." This comment is placed directly beneath another note to tell the employees that his accomplishments in obtaining new equipment were made because he "saw a need, not as a response to grievances." (R. Exh. 3 p. 2.)

Two days after the August 26 meetings, the election was held, resulting in a tie vote. One other allegation of election misconduct must be discussed. Schauer testified that he received an increase in pay "right around our election time." (Tr. 49.) He reported that Marach told him that his wages were "under review." (Tr. 49 and 64.) He noted that this wage review was abnormal, since wages were traditionally reviewed and adjusted in the spring.[17] On further questioning, Schauer indicated that the wage increase took effect "the week after the election." (Tr. 51.) Schauer also reported that he was uncertain as to the meaning of Marach's comment that his wages were being reviewed. He did not know whether this meant that they were being considered for increase or decrease. In contrast to Schauer, Marach testified that this conversation about a wage review took place after the election. He further testified that he never spoke to any employees about a pay raise prior to the election. Employee pay raises were announced approximately 4 to 6 days after the election and became effective during the second week of September.[18] Borkenhagen testified that he decided to grant pay raises because he thought the election was over and he "wanted to . . . get some parity between the employees and their wages based on their skills, qualifications and experience." (Tr. 172.) When asked if the organizing campaign had anything to do with his decision to grant the raises, he replied, "Absolutely not." (Tr. 172.)

After the election, the Union filed unfair labor practice charges and objections to the fairness of the election. On consideration of the initial charges and subsequent amendments, the Regional Director filed a complaint and notice of hearing and an order consolidating the unfair labor practice charges with the election objections since they are "directly related and/or identical." (GC Exh. 1(j) p. 5.)

B. Legal Analysis

With this history of the organizational campaign and the Company's response as the backdrop, I will now address each of the General Counsel's allegations of impropriety. Although the allegations are discussed individually, I have been guided by the requirement that such allegations be measured against the overall context of the history of labor relations between the Company and its employees. The Board has held that "the totality of relevant circumstances" must be appraised and that

[16] The copy placed into evidence contains check marks and highlighting that were added after August 26. (R. Exh. 3 p. 2.) I have disregarded these additions.

[17] This appears to be incorrect. Both Lauer and Marach report that the annual raises took effect on July 1, 2002.

[18] GC Exh. 11 displays the amount of each employee's raise. While the amounts varied, all but two of the eight unit employees were granted some increase in compensation. Lauer and Schauer were among those who received an increase.

written and oral statements should not be viewed in isolation from each other. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994); and *UARCO, Inc.*, 286 NLRB 55, 58 (1987), review denied 865 F.2d 258 (6th Cir. 1988).

In addition to assessment based on overall appraisal of the events under consideration, I have also considered the unique aspects of relations between the employer and employees involved during an organizational campaign. The Supreme Court has outlined the type of realistic appraisal required by noting that:

> [a]ny assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in S[ection] 7 and protected by S[ection] 8(a)(1) and the proviso to S[ection] 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.
>
> . . . .
>
> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit."

NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969). With this guidance, I will turn to the allegations set forth in the General Counsel's complaint.

1. The Company's no-solicitation rule

Before reaching the events of the actual organizing campaign, the General Counsel contends that the Company's preexisting no-solicitation rule was unlawful. That rule is located in the Company's employee handbook. (R. Exh. 1.) The record does not disclose the length of time this rule has been in effect, but there is no contention that it was imposed in connection with the organizing campaign.

In evaluating rules governing employee solicitation, the Board has defined the legal consequences arising from the use of two terms-of-art, "working hours" and "working time." Superficially, these phrases sound similar. For both legal and practical reasons, the Board has held that they are actually radically dissimilar. In its leading case on this question, the Board described and reaffirmed its previous holdings that no-solicitation rules using the term "working hours" are presumed to be unlawful, "because that term connotes periods from the beginning to the end of workshifts, periods that include the employees' own time." *Our Way, Inc.*, 268 NLRB 394, 395 (1983). By contrast, no-solicitation rules that employ the phrase "working time" are presumed to be lawful, "because that term connotes periods when employees are performing actual job duties, periods which do not include the employees' own time such as lunch and break periods." *Our Way, Inc.*, supra at 395. The guiding principle is that rules prohibiting employee solicitation during working time must "state with sufficient clarity that employees may solicit on their own time." *Our Way, Inc.*, supra at 395.

I will consider the validity of the Company's rule, while keeping in mind the Board's interpretations of these terms-of-art. The Company's entire rule is:

> Solicitation
>
> In order to prevent disruption of operations, interference withwork, and inconvenience to other employees, solicitation for any cause or distribution of literature of any kind *during working hours* is not permitted. Nor may an employee who is not *on working time*, solicit an employee who is *on working time* for any cause or distribute literature of any kind to that person. *Working time* does not include lunch periods or breaks. Persons not employed by Superior Services may not solicit for any purpose or engage in distribution of literature of any kind on Superior Services' premises at any time.

(R. Exh. 1.) (Emphasis added.) Unfortunately, the author of this rule chose to employ both the presumptively valid and the presumptively invalid phrases. In addition, the writer chose to properly define the limited scope of the term "working time" as excluding lunch or break time, but failed to provide any limiting definition for the term "working hours."

I conclude that by conflating two similar phrases with vastly different meanings in law and practice, the employer has created a substantial ambiguity. In at least three recent decisions, the Board has emphasized that such an ambiguity created by an employer renders a work rule invalid. See *Altorfer Machinery*, 332 NLRB 130 (2000) (ambiguity that puts in doubt employees' right to engage in union solicitations is construed against the employer who formulated the offending provision); *Grouse Mountain Lodge*, 333 NLRB 1322 (2001) (ambiguity that puts in doubt employees' right to engage in union solicitation without fear of punishment is construed against employer); and *Baptist Medical Center*, 338 NLRB No. 38, slip op. at 18 (2002) ("[w]here, as here, the language of a no-solicitation rule is ambiguous and can reasonably be interpreted by employees in such a way as to cause them to refrain from exercising their statutory rights, the rule is deemed to be invalid . . .").

Other evidence does not overcome the presumption of invalidity created by the ambiguous drafting of the Company's rule. The Board has permitted an employer to produce extrinsic evidence that, despite the language of an overbroad rule, it communicated to its employees an intension to permit solicitation during breaks and lunch periods. *Our Way, Inc.*, supra at 395 fn. 6. No such evidence was presented in this case. Furthermore, the Board has observed that the presumption of invalidity is not rebutted by evidence showing that employees have ignored the no-solicitation rule without incurring disciplinary consequences from their employer. *Ichikoh Mfg., Inc.*, 312 NLRB 1022 (1993), enf. 41 F.3d 1507 (6th Cir. 1994), and *Altorfer Machinery*, supra.

In agreeing with the General Counsel's assessment of the Company's no-solicitation rule, I find the language of the Second Circuit to be particularly apt:

> The true meaning of the [employer's] rule might be the subject of grammatical controversy. However, the employees of

> respondent are not grammarians. The rule is at best ambiguous and the risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it.

NLRB v. Miller, 341 F.2d 870, 874 (2d Cir. 1965). Reading the Company's rule in its entirety, employees would have no assurance that solicitations made while they are at lunch or on work breaks would not run afoul of the rule. As a result, the rule is overbroad and unlawful.

2. Preventing distribution of union literature

The General Counsel contends that the Company's unlawful effort to prevent prounion solicitations included statements of two supervisors, Marach and Borkenhagen, informing employees that distribution of union literature was prohibited on company property. It is also alleged that Marach removed union literature that had been placed on the lunchroom tables for distribution to employees.[19]

The Board has recognized that there are differences between oral solicitations and distribution of written materials. Employers have greater latitude to limit distribution of materials because of potential workplace hazards arising from litter. As a result, rules limiting oral solicitations must be confined to employees' working time. No-distribution rules may include prohibitions affecting working areas even during nonworking periods. *Hale Nani Rehabilitation & Nursing Center*, 326 NLRB 335 fn. 2 (1998). As to nonworking areas, the Board has delineated a broad protection for distribution of literature. In *Mid-Mountain Foods,* 332 NLRB 229 (2000), enf. 269 F.3d 1075 (D.C. Cir. 2001),[20] it held that

> [s]imply put, employees have the right to distribute literature in nonworking areas . . . . This right would have been contravened in the instant case even if the supervisors involved had removed both prounion and antiunion literature. In the absence of a showing (which has not been made here) that the literature was strewn about in an unsightly or hazardous manner, its removal from employee break areas violates Section 8(a)(1) of the Act.

332 NLRB 229 at 230. Finally, the Board has held that the employer's right to preclude distribution of literature in working areas does not extend to a mixed use area. For example, if an area is used for production during most of the day, but serves as a lunchroom during the lunch period, distribution of literature may not be prohibited. *United Parcel Service*, 327 NLRB 317 (1998), affd. 228 F.3d 772 (6th Cir. 2000), citing *Rockingham Sleepwear*, 188 NLRB 698, 701 (1971).

The evidence in this case shows that on August 23 Lauer placed brochures describing the Union's programs and benefits on a table located in the employees' lunchroom. He testified that he left sufficient copies to provide one for each employee in the proposed bargaining unit. Assuming that he did not leave one for himself, this would have amounted to seven copies. It is uncontroverted that Facility Manager Marach confiscated these materials.

Lauer and Schauer testified that in separate conversations Marach told each of them that the brochures were removed because union literature was not permitted on company property. In his own testimony, Marach waffled. At first, he indicated that he merely told Lauer and Schauer that union literature was not allowed on the lunchroom tables. Later on, he conceded that he told them that the employee handbook prohibited the possession of union literature on company property. Marach also testified that the reason for refusing to allow union literature on the lunchroom tables was that these tables were used by the Company to distribute written information to the employees about programs, benefits, and meetings. Marach did note that he was aware that employees had used the tables for placement of literature about Girl Scout cookies and a Lions Club sponsored stock car.

Viewed in the light most favorable to the Company, the evidence shows that the lunchroom was a mixed use area since occasional meetings were held there. Such meetings appear to have been relatively infrequent and there is no doubt that the primary purpose of the room was as a lunch facility. There is no evidence whatsoever to indicate that the distribution of a small number of brochures led to any unsightly, disorganized, or hazardous condition in the lunchroom. Likewise, there is no evidence that distribution of these brochures impeded the use of the tables for distribution of company materials in any significant way. For these reasons, the Board's holding in *Mid-Mountain Foods*, supra, precludes the Company from prohibiting distribution of union literature by placing it on the lunchroom tables.

Beyond the Board's general rule granting a right to distribute literature in the manner under discussion, I find that the Company's actions constituted unfair labor practices because those actions were improperly motivated by antiunion animus. The Board has clearly held that promulgating or enforcing a rule against distribution of union literature is unlawful if it is done as a response to union organizing. *Waste Management of Palm Beach*, 329 NLRB 198 (1999). The evidence demonstrates that this is what the Company chose to do. In reaching this conclusion, I place emphasis on the testimony of Dziekan, the Company's site foreman. When asked if the Company had a preexisting policy against placing literature on the lunchroom tables, he testified that there was "[n]othing really carved in stone that you couldn't do that." (Tr. 189.) Further evidence of a change in the Company's policy at the time of the organizing campaign was the discussion of the distribution issue that took place at the employee meeting of August 26. Questions were raised regarding the recent confiscation of the Union's brochures. Borkenhagen reported that Marach had told Lauer and Schauer that placement of these materials on the tables was prohibited by "company policy." (GC Exh. 4 p. 4.) He was challenged regarding the existence of such a policy. Lauer asked him whether there was anything in writing. In response, he simply

[19] The complaint states that Marach "implied" that the Company had removed this literature. (GC Exh. 1(g) p. 3.) In fact, the evidence showed that Marach directly informed Lauer and Schauer that he had removed the literature from the lunchroom.

[20] The D.C. Circuit enforced the Board's decision in *Mid-Mountain Foods* on other grounds. It indicated that it would "leave to another day" consideration of the Board's views concerning the right to distribute literature in nonworking areas. *Mid-Mountain Foods, Inc. v. NLRB*, 269 F. 3d 1075, 1077 (D.C. Cir. 2001).

reiterated that it was company policy to prohibit placement of the brochures on the lunch tables.

Based on Dziekan's testimony and Borkenhagen's evasive statements during the August 26 meeting, I conclude that there was no preexisting policy about use of lunchroom tables for distribution or display of written materials. This conclusion is bolstered by the evidence that placement of materials involving other subjects was tolerated and by the fact that the Company did not offer any evidence of a preexisting policy regarding this issue.[21]

It is clear that the Company first enforced any purported policy against distribution of literature on lunchroom tables during the organizing campaign. The timing of this new policy is certainly probative of discriminatory intent. Even more tellingly, Borkenhagen told the employees why the policy was being enforced. He explained that

> Its not allowed. Whether you like it or not, this isn't owned by the Union. I assure you the Union would not allow me to go to their building . . . . and it is company policy. We're campaigning[,] we feel we have to do this to be competitive.

(GC Exh. 4 p. 4.)[22] By making this statement to its employees, management clearly revealed the intention motivating the sudden enforcement of a policy against distribution of materials by placement on the lunchroom tables.

Based on the evidence and the reasonable inferences to be drawn from it, I find that the Company's behavior mirrors conduct found to be unlawful in *Cannondale Corp.*, 310 NLRB 845 (1993). In that case, the Board upheld an administrative law judge's conclusion that adoption of a no-distribution rule was animated by the intention of discouraging union activity and that the asserted reasons for the rule were pretextual. The judge observed that

> the timing of the promulgation of the rule was closely related to the union campaign which began shortly before. Moreover, announcement of the rule was accompanied by an announcement of an antiunion policy that implicitly explains the reason for the rule. There was no other explanation for the rule, either in writing or orally, at the time it was announced to the employees. In these circumstances, it is clear, and I find, that the rule [was] promulgated to combat the Union and not for any other purpose.
>
> The Respondent has not been able to show that the rule was promulgated to maintain production or discipline. First of all, that reason was not given to the employees at the time the rule was promulgated and announced. Secondly, [a supervisor's] testimony about the reason for the rule implicates union activity.

310 NLRB at 849. Likewise, Borkenhagen explained that the purpose of the rule was to prevent the Union from using the Company's facility as a platform for advocating representation. As a result, the Company's promulgation and enforcement of the policy was improperly motivated and unlawful. By the same token, Marach's and Borkenhagen's statements to employees regarding that policy were also unlawful.

3. Alleged coercive interrogations

The General Counsel contends that Borkenhagen engaged in a series of coercive interrogations of Schauer and Lauer. In support of this allegation, Lauer and Schauer testified that Borkenhagen spoke to the two union activists in the lunchroom. He introduced himself to the two men and expressed an intention to make changes in the workplace. He offered to try to work out any differences. Toward the end of the conversation, he asked the men if they had "a meeting that night." (Tr. 71.) Schauer replied in an evasive manner that avoided confirming the existence of the planned meeting.

Lauer and Schauer also testified that they had a second lunchroom conversation with Borkenhagen a week later. Schauer contends that Borkenhagen again asked the men "where and when" a union meeting would be held. (Tr. 33.) He reported that he responded in the same manner as during the first conversation. Lauer described this meeting in his testimony but did not indicate that Borkenhagen asked any questions regarding union meetings. Schauer also described a third meeting of the three men. He did not report any questioning by Borkenhagen during that discussion. Borkenhagen testified that he never asked questions about union meetings, explaining that such information was "irrelevant to me." (Tr. 171.)

There is an evident conflict in the testimony of the three men involved in these conversations. I have already noted that Schauer was a poor historian.[23] This impression is reinforced by the fact that he testified that Borkenhagen asked the same question during each of the first two meetings and received the same response. Unlike Schauer, I have concluded that Lauer was a careful, precise, and reliable historian. He corroborated Schauer's account of the first conversation. As counsel for the Company notes, it is therefore striking that he failed to corroborate Schauer's assertion that Borkenhagen repeated his questioning during the second conversation. As to Borkenhagen's blanket denials, I find his professed indifference to the details of the organizing campaign at odds with the large quantum of evidence showing that he spearheaded the Company's counteroffensive. On balance, I find that the first alleged interrogation occurred in the manner described by Schauer and Lauer. I further find that the second alleged interrogation did not occur. Schauer has simply confused the contents of two conversations.

[21] I recognize that the Company did introduce its written solicitation policy. I have previously found this to be impermissibly ambiguous. Interestingly, the Company also introduced evidence of a provision in the handbook requiring employer authorization for placement of any materials on the Company's bulletin board. (R. Exh. 1.) In context, the absence of a provision regarding the need for similar employer permission for placement of articles on the lunchroom tables is noteworthy.

[22] Although not material in any event, I reject the logic of Borkenhagen's analogy between the Union's offices and the Company's premises. His attempt to equate the two facilities ignores the Company's significance as the workplace. It was the only site with obvious access to the entire work force, including union sympathizers, union opponents, and undecided employees.

[23] I find this to be somewhat puzzling since he was clearly aware that events involved in the organizing campaign could result in litigation. It will be recalled that Schauer was the individual who taped certain key conversations.

Lastly, there was no evidence whatsoever that any interrogation took place during the third conversation.

Having found that Borkenhagen did interrogate Lauer and Schauer on one occasion by asking them for information about the date and place of a union meeting, I must assess the legality of this questioning. In its leading case in this area, the Board has eschewed any per se rules about interrogations. Instead, it has mandated an approach based on assessment of the totality of the relevant circumstances. *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Among the factors to be considered are the general context, the nature of the information being sought, the identity of the questioner, the location of the encounter, and the method of interrogation. *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964).

Applying this analysis, I note that while the questioner was a high-ranking supervisor, he asked a single question during an informal discussion. He directed this question to two open union activists. There was nothing intimidating or coercive in the manner of the questioning. I do not find evidence of coercion from Schauer's decision to reply to the question in an untruthful manner. While this has sometimes been construed as evidence of such coercion, in this situation I adopt the reasoning of the Seventh Circuit, noting that the probative value of this factor is doubtful, since

> [a]lthough the assumption is that an intimidated worker is more likely to lie, one can argue with equal plausibility that it is the meek who confess—that it requires a brazenness inconsistent with an inference of intimidation for a worker to lie to his supervisor.

NLRB v. Acme Die Casting Corp., 728 F.2d 959, 962 (7th Cir. 1984). I do not find that Schauer's misleading answer to Borkenhagen's question was the product of intimidation.

Both the General Counsel and the Company cite Board precedents in support of their characterizations of Borkenhagen's questioning. I find the cases primarily relied on by the General Counsel to be distinguishable. In *Kellwood Co.*, 299 NLRB 1026 (1990), enf. 948 F.2d 1297 (11th Cir. 1991), the employee was not an active or open union supporter. He was taken to a private area for the questioning. The questions were asked persistently and were designed to ascertain how the employee planned to vote in the election scheduled for the next day. These highly intimidating circumstances stand in stark contrast to the single question propounded during a nonthreatening conversation with two open union activists. Likewise, in *Multi-Ad Services, Inc.*, 331 NLRB 1226 (2000), enf. 255 F.3d 363 (7th Cir. 2001), the meeting was held in the department manager's office. Two management officials interviewed one employee. During the meeting, "the managers focused on the topic of union representation and probed the reasons for [the employee's] union interest." 331 NLRB at 1226. As in *Kellwood*, the questions were designed to obtain information about the employee's attitude toward union representation. By contrast, Borkenhagen's question did not seek to reveal this type of highly personal information. In addition, the informal and casual circumstances clearly contrast with those described in the referenced precedents.

The Company relies on a recent decision, *John W. Hancock, Jr., Inc.*, 337 NLRB No. 183 (2002). In that case, during an informal discussion, a supervisor asked an employee how many workers attended a union meeting. The Board noted that

> [t]he question arose casually as part of an ordinary conversation, nothing in the record suggests that [the supervisor's] tone was hostile, and no threat of reprisal, explicit or implicit, accompanied the question.

337 NLRB, No. 183, slip op. at 3. The Board noted that the nature of the supervisor's question was not coercive since the information sought was not designed to uncover the union sentiments of any individual. The questioning was not found to be unlawful. These circumstances mirror those involved in this case.

Based on the totality of circumstances, I do not find that Borkenhagen's questioning of Lauer and Schauer was coercive or unlawful. The atmosphere of the questioning, the limited nature of the single question, the employees' open union sympathies, and the absence of any threat or intimidation direct this conclusion.

4. Explicit and implicit preelection promises of benefits

The General Counsel contends that Borkenhagen made promises of benefits during his three lunchroom conversations with Lauer and Schauer. In addition, Borkenhagen is alleged to have made further promises of benefits during his speeches to employees on August 7 and 26. In each instance, the promised benefits consisted of improved working conditions, including additional equipment and personnel.[24]

Lauer and Schauer testified that during their three lunchroom discussions, Borkenhagen told the men that he would "make necessary changes to make it a better place to work." (Tr. 32.) Specifically, he indicated that he would try to obtain more equipment and staff. While Borkenhagen disputed Lauer and Schauer's account of his questioning regarding a union meeting, he was not asked to deny, and he did not deny, having made this commitment to attempt to obtain more equipment and personnel. I credit Lauer and Schauer's description of Borkenhagen's statements in this regard.

The transcript of Borkenhagen's comments to employees during the August 7 meeting shows that he offered to do "whatever I possibly can" to address issues involving "equipment, personnel, needs, changes in the company, changes in the economy." (GC Exh. 3 p. 1.) Significantly, he told the employees that "now is the time to bring some of those questions out." (GC Exh. 3 p. 1.) During the August 26 meeting, Borkenhagen described items of equipment that he had acquired and again promised to seek even more. He also noted that it would

[24] Counsel for the Company argues that the General Counsel failed to prove that Borkenhagen's statements that he would try to obtain more equipment and personnel were promises that would be seen to benefit the employees. This is disingenuous. If Borkenhagen did not perceive these items to be of value to the employees, why did he repeatedly discuss them in the course of his efforts to win the representation election? It is apparent from the overall context that additional equipment and more workers constituted something desirable from the point of view of the existing employees.

be difficult to obtain more staff, but added that, "I'm gonna try, gonna try, gonna try." (GC Exh. 4 p. 3.) He repeatedly suggested that the employees give him a chance to prove himself and he noted that if he failed to satisfy them, "you can bring election up at a later date." (GC Exh. 4 p. 5.)

The Supreme Court has held that promises of benefits made during an organizing campaign may be unlawful, noting that

> [t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964). The fact that an employer couches the promises of benefits in language that does not guarantee anything specific does not remove the taint of illegality. In *Reliance Electric Co.*, 191 NLRB 44 (1971), enf. 457 F.2d 503 (6th Cir. 1972), at preelection meetings, management officials told the employees that they would "look into" or "review" problems. The Board noted that

> such cautious language, or even a refusal to commit Respondent to specific corrective action, does not cancel the employees' anticipation of improved conditions if the employees oppose or vote against the unions.
>
> Accordingly, in view of the foregoing, particularly the timing of the February and the May meetings which coincided with the organizational campaigns of the unions, we find . . . that all of these meetings violated Section 8(a)(1) of the Act and that the May meetings interfered with the freedom of choice of the employees in the election.

191 NLRB at 46.

Borkenhagen's repeated promises to try to obtain more equipment and staff were made during the context of discussions about the Union's organizing campaign. An implicit link was drawn between Borkenhagen's promises and the upcoming election. Indeed, during at least one portion of his commentary on August 7, Borkenhagen made the connection much more explicit. When he asserted that "now is the time" to raise issues such as equipment and personnel, he could not have been clearer in suggesting the linkage between the upcoming election and management's desire to improve employees' working conditions. Such a linkage was unlawful.

I have considered Borkenhagen's status as a new general manager. His pleas to be given a chance in this new capacity form a recurring theme in labor law cases. The Board has held that where such requests for an opportunity to prove oneself are not coupled with promises of benefits, they are not objectionable. *Noah's New York Bagels*, 324 NLRB 266 (1997), citing *National Micronetics*, 277 NLRB 993 (1985). On the other hand, requests for the employees to give a new manager a chance to prove himself are unlawful when they are linked to express and implied promises of benefits. In *Reno Hilton*, 319 NLRB 1154 (1995), the Board held that

> [i]n our view, [a new supervisor's] request for a chance to "deliver," taken in the context of his earlier references to benefits already bestowed, and in the broader context of the Respondent's unlawful promises of benefits, grants of benefits, and implied promises to remedy grievances, would be interpreted by reasonable employees as an implied promise either to grant additional benefits or to remedy employees' grievances, or both. Accordingly, we find that [the] statements violated Section 8(a)(1).

319 NLRB at 1156. As in *Reno Hilton*, supra, Borkenhagen's pleas for time to prove himself were made in the context of comments alluding to benefits (additional equipment) already provided and future benefits that he would attempt to obtain (more equipment and more personnel). Given the context, his pleas were unlawful. The General Counsel has established that the Company engaged in improper solicitation of grievances and promises of benefits as alleged in the complaint.

I note that in concluding that management's solicitation of grievances violated the Act, I have considered the Company's defense. That defense centered on the contention that none of the solicitations of grievances:

> significantly varie[d] from either the Company Policy, the past practice of Borkenhagen or the past practice of Gene Kramer, Borkenhagen's predecessor.

(R. Br. at 46.) The evidence does not support this assertion. The Company has a written policy entitled "Complaint/Problem Solving Procedure." It simply provides that employees should not hesitate to discuss problems with their supervisors. It goes on to instruct that if this procedure does not adequately resolve a problem, it is appropriate to contact the human resource department. (R. Exh. 1.) I cannot find that Borkenhagen's repeated solicitations of grievances in the period immediately preceding the election were made consistently with this policy. Other than a vague observation that "[c]ommunication is a two-way street," the written policy is entirely devoted to the manner in which employees may initiate discussion of work issues. In other words, it articulates a passive stance in which the Company pledges its willingness to receive and discuss complaints initiated by employees. This is a far cry from the very active pattern of inviting such complaints initiated by Borkenhagen in conjunction with the Company's campaign against union representation.

The Company did present witnesses who indicated that Borkenhagen had occasionally asked individual employees "how things are going" and if they had "problems and concerns." (Tr. 106.) Chris Duba testified that this happened at least weekly. On the other hand, Foreman Dziekan said that it was "not very often" that Borkenhagen would raise such issues. (Tr. 189.) Borkenhagen himself essentially confirmed his conformity with the Company's overall passive stance, noting that he maintained an "open door policy." (Tr. 157.) The evidence also showed that Kramer followed a similarly passive practice regarding employees' problems. For example, Dziekan testified that Kramer approached him about such things "[a] couple of times throughout the years." (Tr. 186.) David Brickler indicated that Kramer never asked him if he had any problems to discuss. Gene Zabler described both Kramer's and Borkenhagen's stance as simply telling employees to see them if they had any problems or concerns. There was also some testimony that

management would invite employees to raise issues of concern during quarterly meetings or safety meetings.

I conclude that the Company's policy as written and practiced was primarily the adoption of a passive attitude involving a willingness to address problems when an employee initiated such a dialogue. Beyond this, Borkenhagen, and to a considerably lesser degree Kramer, would make occasional casual references to employees regarding the existence of problems or concerns. This evidence of the Company's past behavior is a far cry from the repeated solicitation of grievances made during the period immediately preceding the election. In particular, the evidence regarding past practices cannot remove the taint from solicitations made during Borkenhagen's obliquely worded, but nevertheless obvious, conversations with Lauer and Schauer regarding the union campaign. This is even truer of his solicitations made during meetings that the Company had convened for the purpose of presenting its views regarding the representation issue. Indeed, it must be recalled that during the first of those meetings, Borkenhagen raised problems involving equipment, staffing, and other employee needs. Shortly afterwards, he told the assembled employees that "now is the time to bring some of those questions out." (GC Exh. 3 p. 1.)

Additional insight into the Company's reason for the solicitation of grievances was provided by Borkenhagen's testimony that one of the purposes of the meeting convened to discuss benefits with the employees was to suggest to them that if they did not wish to "confront" their employer regarding outstanding issues or problems, there were "other methods and means within the organization to pursue." (Tr. 158.) This testimony draws the clear connection between the solicitation of grievances and the Company's desire to defeat the organizational campaign.

The evidence will not support a finding that the solicitations of grievances at issue were made in conformity to any preexisting policy or practice. Instead, the evidence demonstrates that they were made for the purpose of interfering with the employees' Section 7 rights.

5. The Company's descriptions of the consequences of union representation

The General Counsel contends that the Company made incorrect and improper predictions regarding the consequences of a union victory in the representation election. Specifically, it is alleged that during the two meetings with employees on August 7, Borkenhagen indicated that the Company would bargain from scratch, would freeze wages and benefits, and might never reach agreement with the Union. It is also alleged that the Company posted campaign literature that mischaracterized the law regarding replacement of economic strikers in such a manner that the Company threatened its employees with discharge in the event the Union called them out on strike.

Borkenhagen's assertions regarding the collective-bargaining process made during the first employee meeting are preserved on the transcript of Schauer's tape recording. After he solicited grievances and made promises of benefits, he turned to the question of how things would proceed if the Union were elected as the employees' representative. He noted that he had past experience with the collective-bargaining process. He asserted that "whatever we currently have now is basically thrown out the window" and that the "foundation you start from, its zero." (GC Exh. 3 p. 2.) He went on to tell the employees that everything is frozen "currently the way it is." (GC Exh. 3 p. 3.) This freeze could last for a year, "or possibly more." (GC Exh. 3 p. 3.) In response to an employee's question about this, Borkenhagen reiterated that, "really you start from scratch." (GC Exh. 3 p. 9.) Near the end of the discussion, he told the employees that it was possible that the Company and the Union might never reach any agreement. He predicted that if this should happen, "the company is going to do whatever it has to to survive." (GC Exh. 3 p. 9.)

While no tape or transcript of the second meeting was made, I conclude that Borkenhagen made similar assertions regarding the consequences of a union victory in the representation election. I credit Dziekan's testimony that Borkenhagen told the employees that there would be "[n]o pay changes. No benefit. Everything stays the same until negotiations are finalized." (Tr. 186.) This is entirely consistent with the tenor and import of his remarks as contained in the transcription of the first meeting. It is logical to conclude that Borkenhagen would not have significantly varied his presentation to the two groups of similarly situated employees.

In assessing Borkenhagen's statements on August 7, I have also considered the Company's written comments on these same campaign issues. In a preelection posting, the Company informed its employees that "[y]our current wages will remain the same with no changes during negotiation of a contract." Several sentences later, this was stated another way. Employees were told that "[y]our wages and benefits would be frozen at current wage policy levels for the period of negotiations until a final agreement is reached." The document also asserts that negotiations could last "even up to one year." (GC Exh. 6 p. 1.) In another campaign posting, the Company warned that it could take "many months, even years, from election day to the day a contract is signed." (R. Exh. 2.)

In assessing employer campaign assertions of the type made by Borkenhagen, the Board has stressed that context is all important. It has noted that

> [a]n employer can tell employees that bargaining will begin from "scratch" or "zero" but the statements cannot be made in a coercive context or in a manner designed to convey to employees a threat that they will be deprived of existing benefits if they vote for the union.

Somerset Welding & Steel, Inc., 314 NLRB 829, 832 (1994) (Citations omitted.) Similar considerations apply to assertions regarding a freeze of wages or benefits. As former Chairman Stephens noted in a concurring opinion, the Board has held that

> in some circumstances, comments referring to a "freeze" may well indicate an employer's retaliatory intent to withhold periodic wage increases from employees simply because they have chosen union representation . . . . In other circumstances, however, an employer may simply be alluding to the fact that the advent of a union in the workplace will interject an additional, perhaps time consuming step in the process by which customary wage increases are implemented.

Mantrose-Haeuser Co., 306 NLRB 377, 378 fn. 1 (1992), concurring opinion.

I find that the key consideration in assessing Borkenhagen's assertions about bargaining from scratch and the freezing of wages and benefits concerns the message he conveyed regarding the Company's preexisting policy of performing annual wage reviews and granting appropriate pay increases based on those reviews. The Company's vice president for human resources testified that the Company's "[c]urrent policy calls for a review of performance of every employee in early summer with wage increase process the first pay period after July 1st." (Tr. 144.) He testified that this policy has been in effect for at least 4 years. I find that Borkenhagen's remarks, taken in the context of the Company's written campaign literature, were designed to sow doubt in the employees' minds regarding the continued application of this annual wage review and increase policy. The overall impression to be gained from his remarks and the Company's written assertions is that pay would be frozen and would remain frozen until a contract was achieved. Furthermore, the Company went to considerable pains to emphasize that this process could take a year or even longer. The choice of this time period conveyed a subtle, yet important, message. The election was scheduled for a date 10 months in advance of the next annual wage review and increase. Thus, if a freeze could remain in effect for a year or longer, employees were left with the distinct possibility that they would be foregoing the 2003 wage review process.

In reaching this conclusion, I recognize that at one point in its literature the Company made a more precise statement regarding the annual review process. In its preelection posting, it told the employees that wages would be frozen "at current wage policy levels." (GC Exh. 6 p. 1.) This may be read to mean that annual reviews would be preserved. However, this language was immediately preceded by a statement that "current wages will remain the same with no changes during negotiation of a contract." (GC Exh. 6 p. 1.) This bold statement, coupled with Borkenhagen's similar assertions, vitiates any curative effect of the Company's one-time formulation of a more accurate comment.[25]

The Company's statements and its attempt to defend those statements in this case bear notable resemblance to the facts in *Teksid Aluminum Foundry*, 311 NLRB 711 (1993). In that case, the company told its employees that wages would be frozen until an agreement with the union was reached. It warned that negotiations could take months or even years. At trial, the company contended that these statements simply meant that the company's practice of granting preset step increases would continue during negotiations. The Board affirmed the administrative law judge's rejection of this position. In discussing the company's argument, the judge noted that

> [w]hile that is a permissible reading, it represents an attempt to clarify ambiguity. The workers to whom the notice was addressed reasonably could infer from the language used that step increases were frozen indefinitely in the event they chose to be represented by the Union. Accordingly, and especially since the notice was posted in close proximity to the representation election set for September 1, I find it an unlawful threat of resulting wage losses, as alleged in paragraph 18 of the complaint.

311 NLRB at 717. As yet another administrative law judge has noted, the vice in the presentation made by this respondent was its failure to adequately convey the real meaning of the concept of a "freeze" during negotiations. The judge noted that the management speaker could have told the employees that scheduled pay raises would continue as in the past. Failing that, the speaker could have simply informed the workers that the company would

> be guided by the principle that the granting of benefits would be decided as if the Union were not in the picture with the pending election. Even this more general answer would have been satisfactory. To answer the question, however, that "everything is negotiable," reasonably leaves in the minds of the employees (who are not law professors or grammarians) that even scheduled pay increases would be "negotiable."

Advo System, Inc., 297 NLRB 926, 940 (1990).

Viewing all of Borkenhagen's remarks together and in context with other representations made by the Company, I conclude that the General Counsel has established that the Respondent mischaracterized the consequences of a union victory in the representation election and threatened employees with loss of wages and benefits in a manner designed to interfere with the employees' Section 7 rights.

The General Counsel contends that the Company's preelection posting contained yet another unlawful threat to the employees. The posting noted that in the event of a bargaining impasse, the Union could "call you out on economic strike." If so, the Company advised that it would have the option of hiring permanent replacements. In that event, "when the strike ends, you may not have a job to return to," since the law does not require the Company to "rehire you if you have been permanently replaced." (GC Exh. 6 p. 2.)

The leading case whereby the Board established the permissible scope of an employer's predictions regarding the consequences of an economic strike is *Eagle Comtronics, Inc.*, 263 NLRB 515 (1982). The Board held that an employer does not violate the Act by telling employees that they are subject to permanent replacement if they go on strike. Furthermore, an employer need not fully explain to employees the nature and scope of the Act's protections for replaced strikers. As a result, employer statements about job status after a strike are acceptable so long as they "are consistent with the law." 263 NLRB at 516. However, the Board noted that an example of a prohibited statement was a comment warning that permanently replaced strikers "would permanently lose their jobs." 263 NLRB 516 at fn. 8. Assertions of this nature are impermissible since they are inconsistent with the law regarding the status of economic strikers. In *Laidlaw Corp.*, 171 NLRB 1366 (1968), the Board held that such strikers retained certain reinstatement rights even if they had been permanently replaced during the

[25] The one more accurate formulation does not approach the standard for an effective repudiation of prior unlawful statements, since it was anything but "unambiguous." *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

work stoppage. Recently, the Board summarized its position on this issue by noting that:

> It is settled that both economic strikers and unfair labor practice strikers retain their status as "employees" under Section 2(3) of the Act . . . . As a result, an employer violates Section 8(a)(3) and (1) of the Act by failing to immediately reinstate strikers upon their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for failing to do so.
>
> The Board has recognized that one legitimate and substantial justification for not immediately reinstating former strikers is a bona fide absence of available work for the strikers in their pre-strike or substantially equivalent positions . . . . However, a striker's right to reinstatement does not expire simply because no suitable work is available when he unconditionally offers to return to work. His right to reinstatement continues until his position or a substantially equivalent position becomes available.

Zimmerman Plumbing Co., 334 NLRB 586, 588 (2001). [Internal citations omitted.]

Other Board decisions have defined the scope of permissible employer assertions regarding the consequences of an economic strike. In *John W. Galbreath & Co.*, 288 NLRB 876 (1988), the Board found no violation where the company told employees that permanently replaced strikers "are not discharged, technically speaking. But they're not working." In recent cases, the Board has reiterated that an employer may inform employees that they may be permanently replaced without also telling them that they would retain employment rights. *Unifirst Corp.*, 335 NLRB 706 (2001), citing *Quirk Tire*, 330 NLRB 917 (2000), enfd. in part 241 F.3d 41 (1st Cir. 2001).

While it is apparent that the Board has preserved a substantial area of employer freedom of expression in this situation, I find that the Company exceeded these bounds. By coupling a warning that "you may not have a job to return to" with an assertion that the Company is not "required to rehire you if you have been permanently replaced," the preelection posting failed to conform to the standards established by the Board. In *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989), the Board held that a reference to loss of employment was impermissible since it warns of job loss while leaving the employees "on their own to divine that the 'loss' is somehow less than total because it is conditioned by a right to return to work after the replacement's departure." In *Baddour, Inc.*, 303 NLRB 275 (1991), employees were told that they "could end up losing your job by being replaced with a new permanent worker." The Board found a violation of the Act, observing that

> [t]he phrase "lose your job" conveys to the ordinary employee the clear message that employment will be terminated. Further, if the employee is also told that his/her job will be lost because of replacement by a "permanent" worker, the message is reinforced. In these circumstances, where the single reference to permanent replacement is coupled with a threat of job loss, it is not reasonable to suppose that the ordinary employee will interpret the words to mean that he/she has a *Laidlaw* right to return to the job.

Id. When the Company told its employees that if they go on strike, they might not have a job to return to because the Company would not be required to rehire them if they had been permanently replaced, the Company presented an incomplete and misleading picture designed to interfere with the employees' Section 7 rights.[26]

In reaching this conclusion, I have considered any possible ameliorative effect of the Company's posted message concerning this issue. In that posting, it told the employees that in the event of an economic strike, they could be permanently replaced and that "[t]his means that the strikers will have lost their jobs, at least until their replacements quit!" (R. Exh. 2.) This statement continues to assert that among the consequences of a strike was the possibility that the employees could have "lost their jobs." While it places limits on this adverse consequence, it fails to meet the Board's requirement that in order to be effective, repudiation of improper conduct must be timely, unambiguous, and specific in nature.[27] *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

6. Changes in employee compensation

The General Counsel contends that the Company made improper statements concerning employees' compensation and took certain action to increase that compensation in an unlawful manner. The first such allegation is that, at "[a]bout the end of August 2002 a more specific date being presently unknown," Marach "threatened" Schauer by telling him that his wage level would be reviewed. (GC Exh. 1(g) p. 4.) It is further alleged that during the same uncertain timeframe at the end of August 2002 the Company granted pay raises to certain employees. Finally, it is alleged that on August 30, 2002, Marach told an employee that he would be receiving a wage increase.

As was characteristic of his testimony concerning the chronological sequence of other events, Schauer was unable to pinpoint whether his conversation with Marach about a wage review took place before or after the election. He did testify that Marach told him that Borkenhagen was reviewing his level of compensation. Marach testified that he never said anything to any employee regarding levels of compensation until after the August 28 election. Given my overall evaluation of Schauer's reliability as to evidence regarding chronology, I

[26] Counsel for the Company cites *Fiber-Lam, Inc.*, 301 NLRB 94 (1991), in support of the legality of the Company's comments. (R. Br. at 62–63.) He correctly notes that much of the written commentary permitted in *Fiber-Lam* mirrors the language of the Respondent's preelection posting. However, he omits the portion of the statement that led the Board to find the entire contents permissible. That portion reads, "[d]uring an economic strike the striker remains an employee, unless fired for misconduct, with a right to reinstatement under certain conditions." Id. Nothing of the sort is to be found in the Respondent's otherwise similarly written statement. Its absence is dispositive.

[27] In fact, the Company's posting is not an accurate description of the full extent of the *Laidlaw* protections. A *Laidlaw* vacancy arises not merely when the striker's replacement quits, but also when an equivalent job becomes available due to the employer's expansion of its work force or its discharge of another employee. In addition, such a vacancy may be created when an employee holding an equivalent job decides to quit. *Pirelli Cable Corp.*, 331 NLRB 1538, 1540 (2000), and the cases cited therein.

credit March. It follows that I find that the Company did not state that it would review compensation levels, nor did it announce any change in those levels prior to the August 28 election.[28]

It is uncontroverted that, immediately after the election, the Company granted wage increases to six of the eight members of the proposed bargaining unit. Marach testified that he announced these increases approximately 4 to 6 days after the election. They became effective as of the September 13, 2002 pay period. (GC Exh. 11.) Borkenhagen testified that he granted these raises because he wished "to get some parity between the employees and their wages based on their skills, qualifications and experience." He "[a]bsolutely" denied any intent to affect the organizing campaign. (Tr. 172.)

I cannot credit Borkenhagen's testimony that he granted the postelection wage increases solely to achieve parity among the employees. For one thing, he never explained how this was accomplished. Prior to the raises, employee compensation ranged from $8.40 to $18.46 per hour. After the raises, it ranged from $9 to $18.46 per hour. If there was any significant increase in parity, the Company failed to show it. By contrast, the timing of the wage increases is highly suggestive of an improper motive. The raises were announced within 4 to 6 days of the polling. Section 102.69(a) of the Board's Rules and Regulations provides that any objections to the conduct of an election must be filed within 7 days of the date of the election. Thus, the raise was granted prior to the expiration of the filing deadline for objections. It must also be recalled that the election had resulted in a tie vote. I find it more likely than not that the raises were granted in an effort to influence a second election if one were to result from the filing of any objections.

As the Seventh Circuit has noted, "[b]enefits conferred to erode union support in the event of a second election may also constitute an unfair labor practice." *NLRB v. Wis-Pak Foods, Inc.*, 125 F.3d 518, 525 (7th Cir. 1997). In *Wis-Pak Foods*, election objections had been filed and were pending. I recognize that in this case no objections had yet been filed. I do not think this to be a dispositive difference. The Board's Rules and Regulations afford clear guidance to employers. Section 102.69 provides that once a question concerning representation has been finally resolved, the Regional Director shall issue a certification of the results of the election. Once this document is issued, "the proceeding will thereupon be closed." Thus, the Board's procedures provide an employer with a clear standard for basing any decision to undertake post election changes, including raises in compensation. When the Respondent announced a pay raise prior to the termination of the period for filing objections and prior to the issuance of a certification of the results of the election, it assumed the risk associated with the timing of the raises. This is even more evident when one considers that the Company presented no evidence suggesting that the announcement of the raises could not have been delayed until certification of the election results. See *Triangle Plastics, Inc.*, 166 NLRB 768, 775 (1967), enf. 406 F.2d 1100 (6th Cir. 1969).

I conclude that the General Counsel has failed to establish that the Company threatened or promised any wage adjustment prior to the date of the election. I further conclude that the General Counsel did establish that the Company announced and implemented postelection wage increases for the purpose of eroding union support in the event of a second election. This constituted a promise of benefits and a subsequent grant of benefits in violation of the Act.

III. OBJECTIONS TO THE ELECTION

The Board conducted an election at the Company's facility on August 28, 2002. As the vote count revealed a tie, the Union failed to obtain a majority. The Union filed timely objections to the conduct of the election on September 4. Additional objections were filed on September 12 and October 31. While the Union subsequently withdrew certain of its objections, the Regional Director added additional objections based on his investigation. As the Regional Director noted in his report, the objections are essentially identical to the allegations regarding unfair labor practices committed by the Company.

I have found that the Company committed unfair labor practices consisting of the promulgation, maintenance, and enforcement of an overbroad prohibition on solicitation and distribution of literature, the grant of a wage increase[29] and workplace improvements, as well as, repeated solicitation of grievances and promise of additional benefits in order to discourage union activity, and repeated threats to freeze wages and benefits, bargain from scratch, refuse to reach a collective-bargaining agreement, and terminate employees in the event of an economic strike. The objections that allege these forms of misconduct are therefore found to be sustained.

The Board has recently admonished that elections are not to be set aside lightly. The objecting party bears a heavy burden of proof and must show that the objectionable conduct affected the employees in the voting unit. *Safeway, Inc.*, 338 NLRB No. 63 (2002). In *Safeway*, the Board noted the continuing validity of the standard articulated in *Clark Equipment Co.*, 278 NLRB 498, 505 (1986), where the Board held that conduct violative of Section 8(a)(1) will, a fortiori, constitute conduct that interferes with the exercise of free and untrammeled choice in an election unless it is virtually impossible to conclude that the misconduct could have affected the election results. Among the factors to be considered are the number of violations, the severity of the violations, the extent of the dissemination, and the size of the unit.

The election in this case involved a unit of employees who split their ballots evenly.[30] While I do not find that the Com-

[28] I also do not credit any assertion that the Company threatened to adjust wages downward. There is nothing to support this. The Company's strategy in general was marked by far more efforts to offer inducements than threats in order to obtain the result it desired. The fact that the Company granted a wage increase immediately after the election also suggests that the wage adjustment review under discussion was for the purpose of increasing wages.

[29] I have determined that the wage increase was announced after the election had been held. As a result, I will not consider it in evaluating the Company's conduct prior to the election.

[30] Very recently, the Board has reiterated that the closeness of the vote is a relevant factor in evaluating the effects of preelection misconduct. *Quest International*, 338 NLRB No. 123, slip op. at 2 (2003),

pany's campaign to persuade the employees to oppose representation was grounded in grave or pervasive threats or intimidation, it nevertheless transgressed the permissible boundaries of conduct in a variety of significant ways. The Company's prohibitions on solicitation and distribution of union literature, including the confiscation of such literature, sent a potent and improper message to all members of the proposed bargaining unit. The repeated solicitation of grievances and promises of benefits made in the direct context of the campaign against the Union sent a more subtle, but equally powerful and illicit message. Lastly, the Company's misleading and ominous characterizations of the consequences of unionization capped those efforts. I am compelled to conclude that these unfair labor practices precluded achievement of the requisite laboratory conditions and materially undermined the employees' freedom of choice. As a result, I will recommend that a second election be conducted.[31]

CONCLUSIONS OF LAW

1. By promulgating, maintaining, and enforcing an overbroad prohibition on solicitation and distribution of literature in order to discourage union activity, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By granting a wage increase and by soliciting grievances and promising benefits in order to discourage union activity, the Company violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By threatening to freeze wages and benefits, bargain from scratch, refuse to reach a collective-bargaining agreement, and terminate employees in the event of an economic strike in order to discourage union activity, the Company violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. By engaging in the pattern of misconduct set forth above, the Company prevented its employees from freely expressing their choice in the election conducted on August 28, 2002.

5. The Company did not violate the Act in any other manner alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I recommend that the Company be ordered to rescind its overbroad rule against solicitations contained in its employee handbook. (R. Exh. 1.)

I also recommend that the Company be ordered to post a notice at its facility in the usual manner. The General Counsel requested that, in addition to this relief, an order be issued requiring General Manager Robert Borkenhagen to read the notice to the employees. In *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29, slip op. at 2 (2001), the Board noted that this type of remedy is "extraordinary" and has been reserved for "egregious" cases. Indeed, in the case relied on by counsel for the General Counsel, *Texas Super Foods*, 303 NLRB 209 (1991), the remedy was imposed where the company's owner "destroyed" the conditions for a fair election and the Board was ordering a fourth election. Other cases involving imposition of this remedy also involved truly outrageous conduct. For example, in *Domsey Trading Corp.*, 310 NLRB 777, 779 (1993), enf. 16 F.3d 517 (2d Cir. 1994), the misconduct included "gross and disgusting, racially and sexually demeaning" behavior and actual violence directed at union representatives. Nothing remotely comparable happened in this case.[32] As a result, I decline to recommend this extraordinary remedy.

For the reasons discussed earlier in this decision, I have also concluded that it is necessary to recommend that the election held on August 28, 2002, be set aside and that a new election be held on the terms set forth immediately below.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended direction of second election and order.[33]

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election directed herein, and employees engaged in an economic strike that began more than 12 months before the elec-

citing *Avis Rent-a-Car System*, 280 NLRB 580, 581 (1986). Obviously, here this factor weighs against the Company.

[31] The Union sought a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Gissel*, the Supreme Court held that the Board's authority to issue such an order was contingent on evidence "showing that at one point the union had a majority." 395 U.S. at 614. There was no such evidence in this case.

[32] In cases involving an employer's alleged unfair labor practices, the natural and necessary tendency is to place the focus on management's misbehavior (and there was a large measure of that here). In fairness, I wish to note that the tone and atmosphere of the tape-recorded meetings was not uniformly negative. Borkenhagen also made fair-minded statements, noting that while the Company would prefer not to have a union, "if it happens, we'll live with it" and that "regardless of what happens . . . I want to do what's right." (GC Exh. 4.) To be clear, I cannot find that these expressions overcame the effects of the repeated improper statements, but it is appropriate to acknowledge that they were made.

[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tion directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the International Union of Operating Engineers, Local 139, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

ORDER

The Respondent, Superior Emerald Park Landfill, LLC, of Muskego, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, or enforcing an overbroad prohibition on solicitation and distribution of literature.

(b) Granting wage increases and improved working conditions to its employees for the purpose of discouraging union activity.

(c) Soliciting grievances and promising benefits for the purpose of discouraging union activity.

(d) Threatening to freeze wages and benefits, bargain from scratch, refuse to reach a collective-bargaining agreement, and to terminate employees engaged in an economic strike for the purpose of discouraging union activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the "Solicitation" provision contained in the employees' handbook.

(b) Within 14 days after service by the Region, post at its facility in Muskego, Wisconsin, copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 23, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 13, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT promulgate, maintain, or enforce an overbroad rule prohibiting solicitation and distribution of literature.

WE WILL NOT grant wage increases or make improvements in working conditions for the purpose of discouraging union activity.

WE WILL NOT solicit employee grievances or promise benefits for the purpose of discouraging union activity.

WE WILL NOT threaten to freeze wages and benefits, bargain from scratch, refuse to reach a collective-bargaining agreement, and terminate workers who are engaged in an economic strike for the purpose of discouraging union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the National Labor Relations Act.

WE WILL rescind that portion of our employees' handbook entitled "Solicitation."

SUPERIOR EMERALD PARK LANDFILL, LLC

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."